No. 01-1693

Supreme Court, U.S.
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In The

Supreme Court of the United States

BETTY WILLINGHAM,

Petitioner,

v.

JAMES LOUGHNAN AND BRIAN BUECLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state officials sued individually under 42 U.S.C. §1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in the plaintiff's case?

2. Whether an interlocutory appeal denying a state official's claim to qualified immunity constitutes the law of the case so as to preclude further consideration of this claim on a subsequent appeal?

3. Whether the law of the case doctrine is necessarily inconsistent with the law of qualified immunity, so that a second appellate panel is always free, following a final adverse judgment, to award qualified immunity to a government official?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
Preface	3
I. The questions presented for review were not timely raised or decided in the district or circuit court below	4
II. The doctrine of materially similar precedent does not contradict fair warning nor differ from other circuit authority	5
III. The law-of-the-case doctrine has not been rejected by the Eleventh Circuit in qualified immunity cases, nor was it applicable below	11
Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987).....7, 10

Ayeni v. Mottola, 35 F.3d 680 (2nd Cir. 1994).....10

Behrens v. Pelletier, 516 U.S. 299 (1996).....18

Brokaw v. Mercer County, 235 F.3d 1000 (7th Cir. 2000).....10

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995).....10

City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 107 S. Ct. 1114, 94 L. Ed. 2d 293 (1987)..... 5

Graham v. Connor, 109 S. Ct 1865 (1989).....12

Hope v. Pelzer, 122 S. Ct. 802 (2002).....3, 6, 20

In re City of Philadelphia, 158 F.3d 711 (3d Cir. 1998).....15, 16, 17, 18

Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994).....17

Kimberlin v. Quinlan, 199 F.3d 496 (D.C. Cir. 2000).....15

Lassiter v. Alabama A&M University, 28 F.3d 1146 (11th Cir. 1994)..... 9

Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991).....16

Marsh v. Butler County, Ala., 268 F.3d 1014 (11th Cir. 2001) (en banc).....8, 9, 10

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996).....14, 15, 18

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)..... 7

TABLE OF AUTHORITIES – Continued

Page

Oladiende v. City of Birmingham, 230 F.3d 1275 (11th Cir. 2000) 18, 19

Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000) 10

Riley v. Camp, 130 F.3d 958 (11th Cir. 1997) 16, 19

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) 4, 6

Sims v. Metropolitan Dade County, 972 F.2d 1230 (11th Cir. 1992) 17

Tennesse v. Garner, 105 S. Ct. 1694 (1985) 12

U.S. v. Katz, 194 F.3d 962 (9th Cir. 1999) 4

United States v. Lanier, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) 6, 7, 8, 10

Veneklase v. City of Fargo, 248 F.3d 738 (8th Cir. 2001) 14

Veneklase v. City of Fargo, 78 F.3d 1264 (8th Cir. 1996) 14

Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984) 17

Wilson v. Layne, 526 U.S. 603, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) 10, 11

CONSTITUTION

U.S. Const. amend. IV 15

STATUTES

18 U.S.C. § 242 6

RESPONDENTS LOUGHNAN & BUECLER'S BRIEF IN OPPOSITION TO BETTY WILLINGHAM'S PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 7, 1987, just before midnight, Petitioner Betty Willingham, was simultaneously shot by Boynton Beach, Florida police Officers James Loughnan and Brian Buecler after having committed a battery on Officer Loughnan and within a split-second of having attempted to murder Officer Ron Panucci, who was attempting to arrest her brother, Arnold Sims.

According to the officers, who testified at her criminal and civil trial, she had a long blade kitchen knife in her hand and was attempting to stab Pannuci in the back at the time she was shot. An independent witness testified at both trials that she was on the step outside her house with an object in her hand at the time she was shot. Willingham claimed that she was standing in the doorway, pulling her hair at the time she was shot. Her version of the events was rejected when she was convicted in June 1989 of both crimes by the criminal court jury, a conviction that was neither appealed nor vacated.

In 1990, Willingham sued the City of Boynton Beach, its police chief Edward Hillery and Officers James Loughnan and Brian Buecler. After the officers moved for summary judgment on the sole state law claims against them in 1992, Plaintiff amended her complaint to bring federal

civil rights claims against them. The officers' summary judgment on the state law claims was denied in 1993.[1]

The officers moved for summary judgment on the federal claim of excessive force in 1995, asserting qualified immunity. In 1996, the district court denied the motion finding that there was a factual dispute not specified in the order and upon the misapprehension that there had been a previous denial of the motion. The officers took an interlocutory appeal to the Eleventh Circuit. Petitioner's motion to dismiss the appeal as frivolous was denied and a stay order denied by district court was granted.

In September 1997, The Eleventh Circuit, in an unpublished opinion, affirmed the denial of the motion for summary judgment due to the claimed factual dispute of whether Plaintiff was doing nothing at the time she was shot or was attempting to murder an officer. In the panel's view, the issue preclusion argument was not properly presented for review.

After the district court again denied the officers' motions for judgment on qualified immunity at trial and post-trial, an appeal was lodged to the Eleventh Circuit of the 5.5 million dollar verdict rendered against the officer by a jury in Dade County.[2] Upon review of the entire record, including the criminal trial transcript and proceedings (as had the district court when it decided the officer's post-trial motion for judgment) the Eleventh Circuit

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[1] These claims were eventually dropped by Plaintiff at the commencement of trial.

[2] The judgment against the City of Boynton Beach for 5 million dollars was set aside by the district court and affirmed on appeal. Petitioner does not seek review of that decision.

properly found that the criminal conviction at a minimum established that Plaintiff was shot within a "split-second" of having attempted to murder one police officer and battering another and was not restrained and potentially in a position to continue her assaults on the police.

Finding that there was no materially similar controlling precedent in 1987, determining that the use of force by these officers under the circumstances presented to them was unlawful, and that there existed a number of decisions finding that such conduct was lawful, the court determined that qualified immunity was applicable to bar the claim against the officers.

Petitioner's suggestion for re-hearing en banc was denied as a motion for rehearing by the panel. No request was made by a judge of the court to poll the judges on the suggestion of rehearing en banc.

REASONS FOR DENYING THE WRIT

PREFACE

At the outset, it should be noted that the "Questions Presented for Review" are juxtaposed to somewhat different questions presented in Petitioner's table of contents and brief. The face page contains three questions; the table of contents brief only addresses two questions.

The first question is raised for hopeful joinder with one of the questions pending decision before the Court in *Hope v. Pelzer,* No. 01-309, 122 S. Ct. 802 (2002) as to whether the "materially similar" requirement is too stringent. However, Petitioner transforms this issue to assert that the Court of Appeals requires prior decisional

law to be "virtually identical"; a position not adopted in any decision of the Eleventh Circuit, nor any other Court of Appeals.

The second question presented is changed from whether the law-of-the-case doctrine could be ignored in deciding succeeding appeals on qualified immunity to one claiming that the Eleventh Circuit has rejected the doctrine when dealing with qualified immunity, allegedly contrary to the view of other Courts of Appeals.

I. The questions presented for review were not timely raised or decided in the district or circuit court below.

Neither question nor issue was timely pressed or decided by the courts below. In the Court of Appeals, Petitioner's response brief makes no argument nor cites any case in support of the proposition that there was circuit precedent prior to 1987 that clearly established that a reasonable officer would know that the officer's conduct violated constitutional law. Nor did Petitioner argue that there was a case that was materially similar or that should have given "fair warning." [*See* Respondents' Appendix].

Indeed, not one of the cases relied upon by Petitioner herein is cited as authority in her response brief in the Court of Appeals. Petitioner did rely upon *U.S. v. Katz,* 194 F.3d 962 (9th Cir. 1999) for the proposition that there was no qualified immunity in excessive force cases. *Katz* was reversed by this Court in rejecting that argument. *See Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Nor did Petitioner argue that there was a conclusive, factual denial of qualified immunity by the Eleventh Circuit before trial that was the "law-of-the-case." Thus, it is not "remarkable" that the doctrine was not mentioned in the Court of Appeals' opinion. Indeed, all that Petitioner concluded was that the district court was correct in denying qualified immunity post-trial. [*See* Respondents' Appendix].

Petitioner did raise the "law-of-the-case" argument in her "Suggestion of Rehearing En Banc" served on August 31, 2001. Also raised was the argument that there allegedly was materially similar precedent that was overlooked. The claimed issue that the materially similar precedent standard is too stringent was not raised. The petition for rehearing was denied without briefing or opinion. [Pet. App. C].

Thus, certiorari should not be granted because the issues presented for review were neither timely presented nor decided in the Court of Appeals. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259, 107 S. Ct. 1114, 1115, 94 L. Ed. 2d 293 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts. See *California v. Taylor,* 353 U.S. 553, 556, n. 2, 77 S. Ct. 1037, 1039, n. 2, 1 L. Ed. 2d 1034 (1957).")

II. The doctrine of materially similar precedent does not contradict fair warning nor differ from other circuit authority.

Petitioner's argument is premised upon the flawed assumption and conclusion that there is a requirement of "virtual identity" to the facts in a precedent case before qualified immunity is surrendered. Indeed, this argument

is merely a repetition of one fashioned by *amici* ACLU in *Hope*, and is not based upon any reported decision of the Eleventh Circuit.

Petitioner does not argue here that there was a materially similar decision that the Court of Appeals overlooked or failed to follow in reaching its conclusion. The heart of *Hope v. Pelzer* is that the Eleventh Circuit found that although the use of the "hitching post" was an Eighth Amendment violation, the prior decision of the predecessor Fifth Circuit, handed down twenty-one years prior to the conduct at issue, was not so substantially similar to provide "fair warning" to the prison guards that their conduct in following prison rules was a constitutional violation.

Indeed, Petitioner's main focus in her response to the officers' appeal below was that there was no qualified immunity in an excessive force claim based upon Ninth Circuit precedent. However, as noted in the decision below, that position was rejected by the Court last term in *Saucier v. Katz, supra*.

Petitioner's principal reliance is upon *United States. v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). In *Lanier*, certiorari was granted to review the standard for determining whether particular conduct falls within the range of *criminal liability* under 18 U.S.C. § 242, not to determine the standard for determining qualified immunity. In *Lanier*, the Sixth Circuit had found that

> criminal liability may be imposed under § 242 only if the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state court), and

> only when the right has been held to apply in "a factual situation fundamentally similar to the one at bar." 73 F.3d at 1393. The Court of Appeals regarded these combined requirements as "substantially higher than the 'clearly established' standard used to judge qualified immunity" in civil cases under Rev. Stat. § 1979, 42 U.S.C. § 1983. 73 F.3d, at 1393. 520 U.S. at 263.

For sure, analogies were drawn by the Court to the standards of conduct similarities to civil and criminal liability of state actors. However, *Lanier* does not depart from the previous well-established principles of *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) and *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985). As this Court explained,

> This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. See, *e.g., Mitchell v. Forsyth, supra,* at 530-535, and n. 12, 105 S. Ct., at 2817-2820, and n. 12.

Lanier, 520 U.S. at 271.

Lanier has not been construed to eliminate the requirement that a plaintiff who seeks to defeat qualified immunity in such cases cannot just allege violation of an "abstract" or "general right," but must show that the constitutional right he asserts was clearly established in a "particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816, 86

L. Ed. 2d 411 (1985) (officials are immune unless "the law clearly proscribed the actions" they took).

The Court of Appeals has not ignored *Lanier*. In *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032-1033 (11th Cir. 2001) (en banc), the court addressed issues raised by *Lanier*. In note 9, the court noted

> We acknowledge that preexisting case law, tied to the precise facts, is not in every situation essential to establish clearly the law applying to the circumstances facing a public official so that a reasonable official would be put on fair and clear notice that specific conduct would be unlawful in the faced, specific circumstances. *See United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 1227, 137 L. Ed. 2d 432 (1997) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.") (discussing 18 U.S.C. § 242); *Lassiter*, 28 F.3d at 1150 n. 4 (leaving open possibility that "occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law");
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> . . . .
>
> Some general statements of law are capable of giving fair and clear warning in some circumstances: the occasional "obvious clarity" cases per *Lanier*. But in other cases, as *Lanier* says, "a very high degree of prior factual particularity may be necessary." 117 S. Ct. at 1227. Especially where the applicable legal standard is a highly general one, such as "to act reasonably" or "to act with probable cause," preexisting case law, that has

> applied the general law to specific circumstances, will almost always be necessary to draw the bright line that is capable of honestly giving fair and clear notice that an official's conduct will violate federal law. *See Anderson,* 107 S. Ct. at 3040 (noting that pertinent qualified immunity question in probable-cause case is "fact-specific" question of whether a reasonable official could have believed, in light of clearly established law, that official's behavior was lawful under circumstances)
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> . . . .
>
> *See also Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001) ("This inquiry [whether a legal right was already clearly established], it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition"); *Wilson v. Layne,* 526 U.S. 603, 119 S. Ct. 1692, 1699-1700, 143 L. Ed. 2d 818 (1999) (saying "the right allegedly violated must be defined at the appropriate level of specificity. . . . ").

Marsh, 268 F.3d at 1032-1033.

The Eleventh Circuit has not adopted a "virtually identical" rule in addressing qualified immunity. Clearly, the Court of Appeals has found that "[O]ccasionally the words of a federal statute or federal constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1150 n. 4 (11th Cir. 1994). As recognized in *Marsh*, the Court of Appeals has held that an official may stray "so far beyond the hazy border between constitutional and unconstitutional

conduct" that the official "had to know he was violating the Constitution even without case law on point." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000) (quoting *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)). 268 F.3d at 1032. This view is not substantially different from that of *Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000) (conduct so severe and egregious and the right violated was so "obvious").

Indeed, the other circuit authority cited by Petitioner does not conflict with Eleventh Circuit views. *Brokaw v. Mercer County, supra*, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) and *Ayeni v. Mottola*, 35 F.3d 680, 686 (2nd Cir. 1994) do not discuss whether fair warning is a more appropriate standard than materially similar precedent.

Buoncore and *Mottola* were grounded upon the supposed bed-rock warrant principles that federal law enforcement officers should have known. However, this Court in 1999, in *Wilson v. Layne* 526 U.S. 603 (1999), resolved a split among the circuits on these principles by finding media ride-alongs violative of the Fourth Amendment. However, the Court also held that those principles were not clearly established in 1992, to defeat the officer's qualified immunity.

Moreover, in *Wilson*, decided two years after *Lanier*, this Court referred to *Lanier*, but found the principles of *Anderson* still controlling,

> In *Anderson*, we explained that what "clearly established" means in this context depends largely "upon the level of generality at which the relevant 'legal rule' is to be identified." 483 U.S., at 639, 107 S. Ct. 3034. "[C]learly established" for purposes of qualified immunity means that

> "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.*, at 640, 107 S. Ct. 3034 (citations omitted); see also *United States v. Lanier*, 520 U.S. 259, 270, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Wilson, 526 U.S. at 614-615.

Though it was contended that right was obvious, the Court noted that " . . . although media ride-alongs of one sort or another had apparently become a common police practice, in 1992 there were no judicial opinions holding that this practice became unlawful when it entered a home." *Id.* 526 U.S. at 616. Thus, the importance of pre-existing judicial precedent was re-emphasized.

Similar to *Wilson v. Layne*, the Court of Appeals reluctantly agreed that the civil trial verdict could be viewed as finding the officers' conduct violative of the Fourth Amendment. However, as in *Wilson*, this did not defeat their entitlement to qualified immunity.

III. The law-of-the-case doctrine has not been rejected by the Eleventh Circuit in qualified immunity cases, nor was it applicable below.

Once again, Petitioner's argument is based upon a faulty premise of a self-created argument. The Eleventh Circuit's first unpublished decision on qualified immunity was addressed by both the district court and the circuit court opinions. [Pet. App. A & B]. The decision was based

upon the fact that there were material issues in dispute, which has long been a basis for denying qualified immunity prior to trial. Such a basis has not been found to have preclusive effect on further reconsideration of the defense at trial.

In this case, the seminal issue was timing. Prior to trial it was not established as to whether Willingham was shot after everything was over or whether the use of force was an integral part of the event. Indeed, as noted several times in the opinion of the Court of Appeals, Willingham testified at trial that she was shot within a "split second" of throwing a knife at Panucci and raising her hands into the air. Moreover, it was established at trial that the entire event occurred within 90 seconds, clearly calling for the sort of "split-second" judgments of the officers envisioned by *Graham v. Connor*, 109 S. Ct. 1865, 1872 (1989).

It was only two years before this incident that *Tennesse v. Garner*, 105 S. Ct., 1694, 1701 (1985) decided that the use of deadly force was lawful where the officer "has probable cause to believe the suspect poses a threat of serious physical harm, either to the officers or others." *Id.*

Moreover, the criminal court transcript had not been presented nor reviewed by either the district or circuit court to determine the parameters of the preclusive effect of the criminal conviction. After its presentation at trial, it was given some weight by the district court. However, the full legal import was only correctly recognized by the Court of Appeals.

Indeed, the first unpublished decision of the Court of Appeals did not make a judicial finding of fact. The District Court, in denying summary judgment, found that "there remain in dispute genuine issue of material fact

regarding the circumstances involved in the incident in question – and thus the applicability of qualified immunity to the case." [Pet. App E, p. 69a]. The Court of Appeals, in affirming this finding, stated that since it declined to address the preclusive effect of the criminal conviction without having the criminal court transcript to review, if Plaintiff's version of the facts were accepted and "*[I]f* the officer fired on plaintiff even though she was posing no threat to anyone, *they would have* violated clearly established law." [Pet. App. D, p. 67a]. (emphasis supplied).

This does not establish that the officers were not entitled to qualified immunity under the facts of the case – it was nothing more than an opinion that **IF** those facts which Plaintiff claims are in dispute are the ultimate facts and that the criminal trial transcript and conviction are not considered, then there would be no entitlement to qualified immunity.[3] However, as the Court of Appeals addressed in detail, the facts at trial and the review of the criminal trial transcript and judgment show that there was clear entitlement to qualified immunity. Petitioner does not argue that the facts were the same at the motion for summary judgment stage as at trial.

Petitioner's reliance on *Tonkovich v. Kansas Board of Regents*, 254 F.3d 941 (10th Cir. 2001) is inapposite. Therein, the district court granted qualified immunity at the Rule 12(b)(6) dismissal stage, which was affirmed by the Tenth Circuit on *de novo* review. The complaint was amended to assert a new federal claim. Again dismissal

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[3] For example, the testimony of Charles Brown, Josh Rahming, Leon Jacobs and Bruce Raticoff were profferred in opposition to the motion for summary judgment, but not presented at trial.

was granted under Rule 12(b)(6), because the previous panel decision found "no set of facts in support of his claim which would entitle him to relief and that the complaint must therefore be dismissed pursuant to Rule 12(b)(6)." *Id.* 254 F.3d at 944. Thus, the first decision was followed because it found that there were no federal claims to be brought under the facts alleged. This hardly supports Petitioner's argument that a denial of qualified immunity because of disputed facts precludes further consideration.

In *Veneklase v. City of Fargo*, 248 F.3d 738 (8th Cir. 2001), the district court concluded that the officers' conduct was not "objectively reasonable" in light of clearly established law. *Id.* at 741. This determination was reversed by the circuit court and qualified immunity was granted. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1270 (8th Cir. 1996) (*"Veneklase I"*). The case was remanded for determination of City liability since it was not the proper subject of an interlocutory appeal. There was no issue of qualified immunity in the second appeal – thus no discussion of any preclusive effect of the determination to *grant qualified immunity*.

In *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996) the Sixth Circuit's analysis of its prior opinion was similar to that of the Eleventh Circuit in the decision below. The Sixth Circuit found that

> Uncertainty about the actual duties of these positions, when their inherent nature is not apparent (no parties to this suit have cited any helpful state or county law defining the duties of the positions), precludes us from reversing the district court's determination. We emphasize that qualified immunity may become available to Testa with respect to any of these positions as

> the facts are crystallized or the relevant state/county law is developed before the district court at any time up to or including the conclusion of trial. Our current disposition of this case does not prevent the district court from granting qualified immunity to Testa with respect to any of these positions.

McCloud, 97 F.3d at 1561, 1562.

Petitioner's reliance on the ultimate sentence that as to one argument that the law was clearly established to deny qualified immunity is sorely misplaced as there is ultimately no discussion of the "law-of-the-case" doctrine in support of that determination.

In *Kimberlin v. Quinlan*, 199 F.3d 496 (D.C. Cir. 2000) the individual defendants moved for summary judgment on qualified immunity which was denied by the district court, finding that "the law was clearly established that prison officials could not interfere with prisoners first amendment right to access to the press." This issue was not appealed, but qualified immunity was granted by the circuit court, but reversed by the Supreme Court. When remanded back to the district court, it refused to revisit the issue on a *renewed motion for summary judgment*, relying on its previous decision as being the law of the case, *since that issue had not been appealed.*

In *In re City of Philadelphia*, 158 F.3d 711 (3d Cir. 1998) a prior appeal on summary judgment, which found that city officials were entitled to qualified immunity, had determined that the conduct of city officials constituted a seizure of Plaintiff by the City within the meaning of the Fourth Amendment. Since, as the Third Circuit emphasized, " . . . that because the evidence was at least as

strong at trial on the issue of seizure as it was at the summary judgment stage, our prior ruling that a seizure occurred controls our resolution of this appeal." 158 F.3d at 722. No such finding was made below that the summary judgment evidence was the same as it was at trial. Indeed, the Court of Appeals pointed out the lack of certain evidence caused it not to consider the legal issues.

When considering the motion for summary judgement, the district court did not address clearly established law in its denial of summary judgment, nor did the Court of Appeals. Indeed, as the district court found in its order on post-trial motion for judgment in their favor, "... the officers properly and timely request that the Court revisit this factual issue, the Court still finds that the qualified immunity defense turns on issues of fact that were properly resolved by the jury." [Pet. App. B, p. 30a, n. 4]. The Court of Appeals found this to be error.

Moreover, Plaintiff's claim that the Eleventh Circuit rejects application of the law-of-the-case is meritless. The basis for this assertion is Judge Tjoflat's *dissent* to the *denial of a request for re-hearing en banc* in *Riley v. Camp*, 130 F.3d 958 (11th Cir. 1997). This dissertation has little precedential value in the circuit. *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991). Indeed, the opinion is solely that of Judge Tjoflat – the balance of the court apparently agreed with the panel analysis of the law expressed by Judge Birch in his response and Judge Kravitch, in her unpublished dissent, that

> "Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." *United States v. Robinson*, 690

> F.2d 869, 872 (11th Cir. 1982) (citations omitted). Therefore, the law of the case doctrine bars our reconsideration of the qualified immunity issue. 130 F.3d at 979.

As far back as 1984, the Court of Appeals, in *Wheeler v. City of Pleasant Grove,* 746 F.2d 1437 (11th Cir. 1984), delineated the general contours of law-of-the-case doctrine as above, and noted that there were certain exceptions, including when (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice. These principles are markedly similar to those discussed by the Third Circuit in *In re City of Philadelphia, supra.*

Most central to the consideration of this doctrine in this case is that in those cases where a motion for summary judgment based on qualified immunity is denied, because the facts are not fully developed, the district court should be free to revisit the qualified immunity question during the post trial to determine whether the facts, as developed at trial, differ from those taken in the light most favorable to the plaintiffs at the summary judgment stage. *See Kelly v. Curtis,* 21 F.3d 1544, 1546 (11th Cir. 1994) (defendants may raise qualified immunity anew at trial in motions for judgment as a matter of law because, "'rulings on summary judgment motions' are 'the facts for present purposes,' but they 'may not be the actual facts.'"); *see also Sims v. Metropolitan Dade County,* 972 F.2d 1230, 1233 (11th Cir. 1992).

If the facts presented by plaintiff at the summary judgment stage become, without notable exception, the "actual facts" as developed at trial, then the qualified

immunity determination, if made at the prior appellate panel, should not be revisited. If however, as here, there truly was no qualified immunity determination made and there was a notable difference as to the facts and development of evidence (e.g., criminal trial transcript introduced; plaintiff admitting she was shot within a split second of throwing a knife) then the defendant's right to raise qualified immunity should be, as it was, preserved.

The Eleventh Circuit's analysis does not differ from that of the other circuits. *See McCloud*, 97 F.3d at 1561, 1562 (qualified immunity may become available as the facts are crystallized or the relevant law is developed before the district court at any time up to or including the conclusion of trial); *In re City of Philadelphia*, 158 F.3d 711, 718 (doctrine does not preclude reconsideration where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice).

Nor is it contrary to this Court's holdings. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court found that qualified immunity could be the subject of two *pre-trial* appeals, because the first may be on allegations and the second on actual facts found in discovery.

Contrary to Petitioner's claim, *Oladiende v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) does not reject the application of the "law-of-the-case" doctrine to qualified immunity cases, it merely, after thoughtful, cogent discussion, found it not controlling in the case. Its application, or lack thereof, was one of the first issues discussed, since it was raised by the plaintiff. There is no discussion of the doctrine in the circuit court's opinion

below since the issue was not raised by Petitioner. [*See* Respondents' Appendix].

Similar to the proceedings below in this case, the prior unpublished decision did not delineate established facts and find that there was no entitlement to qualified immunity – it simply found that facts were in dispute. See Pet. App. A, p. 9a, n. 7. As the analysis of the issue of *Oladiende* concluded,

> Where a previous panel has given no explanation for its decision, a subsequent appellate court panel is "not bound by any 'law of the case' unless a determination by us concerning the propriety of [the district court's order] is necessarily inconsistent with every possible correct basis for the earlier rulings of this court." *Key v. Wise,* 629 F.2d 1049, 1054-55 (5th Cir. 1980). One correct basis for this court's earlier ruling is that there remained genuine issues of material fact in dispute requiring a trial as to the police department's interests and the individual defendants' motives in transferring the plaintiffs. Such a ruling would present no binding conclusion of law as to the defendants' qualified immunity, but would simply allow the case to proceed to the jury. A conclusion now, after the facts have been developed at trial, that the defendants are entitled to qualified immunity would not be inconsistent with this possibly correct basis for the earlier ruling of this court.

Oladiende, 230 F.3d at 1289-1290.

Thus, neither *Oladiende* nor Judge Tjoflat's *dissent* to the *denial of a request for hearing en banc* in *Riley v. Camp,* 130 F.3d 958 (11th Cir. 1997) establish that the Eleventh Circuit has adopted a wholesale rejection of the

law-of-the-case doctrine differing from the other circuits in cases considering the defense of qualified immunity. The defense was properly considered and granted.

CONCLUSION

The Petitioner attempts to revive her case anew by raising new issues not timely made in the Court of Appeals in hopes that the suit will be held pending a decision in another matter. The issues in the case below were not similar to those in *Hope v. Pelzer*.

Moreover, the Court of Appeals for the Eleventh Circuit does not hold the views claimed by the Petitioner. Reliance upon a dissent to denial of a petition for rehearing *en banc*, is not controlling precedent in this or any other court.

The petition should be denied.

Respectfully submitted,

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App. 1

EXCERPTS FROM PETITIONER'S RESPONSE BRIEF AND INITIAL BRIEF ON CROSS APPEAL FILED IN THE ELEVENTH CIRCUIT ON MARCH 13, 2000

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 99-4005-F

BETTY WILLINGHAM

PLAINTIFF/APPELLEE/

CROSS-APPELLANT

VERSUS

JAMES LOUGHNAN and BRIAN BEUCLER

DEFENDANTS/APPELLANT/

CROSS-APPELLEE

RESPONSE BRIEF OF APPELLEE

AND

INITIAL BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

PAGE

Certificate of Interested Persons ..... i-ii

Statement Regarding Oral Argument..... iii

Statement of Jurisdiction iii

Table of Contents ..... iv-v

Table of Citations ..... vi-ix

Brief of Appellee 1

A. Statement of the Issues 1

B. Statement of the Issues Regarding: Cross-Appeal 1

C. Statement of the Case and Facts 2-24

I. Course of Proceedings and Disposition in Court Below 2-4

II. Statement of Facts 4-24

III. Statement of the Standard or Scope of Review 24

D. Summary of the Argument 25-26

E. Argument..... 27-51

I. The District Court did not err in Denying Appellant's Motion for Judgment as a matter of Law 27-41

TABLE OF CONTENTS - Continued

PAGE

A. Appellants Violated the Appellee's Constitutional Rights and Therefore, Are not entitled to qualified immunity..... 27-33

B. The Doctrine of Collateral or Judicial

* * *

E. ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANTS MOTION FOR JUDGMENT AS A MATTER OF LAW

A. APPELLANTS VIOLATED THE APPELLEE'S CONSTITUTIONAL RIGHTS AND THEREFORE, ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Appellants argue that because the Appellee was convicted of attempted second murder, they were within their rights to shoot her eight times. (Appellants' brief, p. 12) In determining whether the conduct of the Appellants was objectively reasonable, the fact that a person was convicted of jaywalking, battery or murder is irrelevant if excessive force was used by the law enforcement officers.

The Supreme Court has held that "[t]he test of reasonableness is an objective one, without regard to the underlying intent or motivation of the officer. The proper question to be asked is whether the officers' actions were objectively reasonable under the facts and circumstances confronting him" *Graham v. Connor,* 109 S.Ct. 1865, 1872

(1989) The jury, by their verdict, determined that Appellants LOUGHNAN and BEUCLER's actions were unreasonable.

In *Dixon v. Richer,* 922 P.2d 1456, 1462 (10th Cir 1991), the court expressed doubts over the use of qualified immunity in the face of an excessive force claim. "[Un-excessive force claims asserted under the fourth amendment, the qualified immunity question is usually answered in the fourth amendment inquiry. This is because in the excessive force context, the fourth amendment inquiry asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances." *Id.* at p. 1463.

"A government official will be protected from suit if the rights that he allegedly violated were unclear at the time of his-actions or he reasonably believed that what he was doing did not violate clearly established law." *Edwards v. Gilbert,* 867 F.2d 1271 (11th Cir. 1989). See also: *Russell v. Coughlin,* 910 F.2d 75, 78 (2nd cir. 1990). There can be no doubt that excessive use of force violates clearly established law. Based upon the evidence presented by the Appellee, the use of deadly force by the Appellants was unreasonable and unnecessary.

The Appellants cite to *Menuel v. City of Atlanta,* 25 F.3d 990 (11th Cir. 1994) to support their argument that their actions were reasonable under the facts of the instant case. (Appellants' brief, p. 13) In *Menuel,* the defendants believed that the plaintiff was only armed with a knife when they entered her bedroom. Upon entering her bedroom, the plaintiff began firing a gun. The defendants returned fire. A bullet hole was found in the tar wall of the bedroom which supported the defendants contention that the plaintiff had shot at them. In addition, no family

members were witnesses to the shooting. *Id.* at p. 993. In that case, the court held that " . . . the shooting to death of the decedent occurred in response to her discharging a .25 caliber pistol aimed toward a police officer at close range in a darkened room. The officers forcefully entered the bedroom because they believed the decedent was either unarmed or carried only a knife. In sum, the officers seized the decedent by shooting her but, in the circumstances of this case, violated none of her Forth Amendment rights as a result." *Id.* at p. 996.

The facts are in no way analogous to the instant case. The witnesses and the evidence support a finding that the Appellee was unarmed at the time of the shooting.

Appellants at trial argued that they were justified in the use of deadly force, while the Appellee stated that the force utilized was unjustified and excessive. Each side presented evidence to support their viewpoint and it was the jury's determination that the force utilized by the Appellants was unjustified. In *Brandenburg v. Cureton,* 882 F.2d 211 (6th Cir. 1989), a case analogous to the instant case, the plaintiff asserted that the defendant officer had shot the plaintiff-decedent without just cause, while the defendant asserted that he and his fellow officers had shot in self defense. The court in *Brandenburg* stated that while the immunity question is a purely legal question, a court may not be able to make that determination where the exact character of the actions are unknown. *Id.* It went on to hold:

> "In this case, however, the jury becomes the final arbiter of the appellant Sharp's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. If the jury determines

> that Sharp fired Brandenburg without a belief that someone was in danger of serious bodily injury, then as a legal matter no reasonable officer could believe that such gunfire would not violate another's constitutional rights. On the other hand, if the jury believes detective Sharp's version of the facts, he will be entitled to qualified immunity."

Id. at 215-6.

In the instant case, the jury did not believe the appellants version of what occurred on October 7, 1987, and therefore, they are not entitled to qualified immunity. "The central legal question is whether a reasonably well-trained officer in the defendant's position would have known that shooting the victim was unreasonable under the circumstances." *Soya v. City of Mt. Pleasant,* 142 F.3d 898, 903 (6th Cir. 1998). Qualified immunity is inapplicable where there are contentious factual disputes over the reasonableness of the use of deadly force. *Id.* A jury's finding of excessive force forecloses an officer's immunity defense. *Frazell v. Flanigan,* 102 F.3d 877, 886-87 (7th Cir. 1996). See also: *Ratz v. U.S., et al.,* 194 F.3d 962 (9th Cir. 1999) *Iacobucci v. Boulter,* 193 F.3d 14 (1st Cir. 1999) *Humnhrev v. Staszak,* 148 F.3d 719 (7th Cir. 1998).

The Appellants' reliance upon *Harrell v. Decatur County, Ga.,* 42 F.2d 1494 (11th Cir. 1995), *vacating and adopting dissent* in 22 F.3d 1570 (11th Cir. 1994 is misplaced. (Appellants' brief, p. 15). The issue in *Harrell* was ". . . whether the use of force was constitutionally reasonable under the totality of the circumstances as a means of seizing a dangerous fleeing felon." *Id.* at p. 1579. The evidence presented in the instant case was that at the time of the shooting, BETTY WILLINGHAM had nothing

in her hands except her hair. No reasonable officer would have shot her at that point.

The fact that a person was convicted of a criminal act is irrelevant to the 42 U.S.C. § 1983 claim, if excessive force was used by law enforcement officers at the time of the arrest. *Hernandez v. City of Los Angeles,* 624 F.2d 935 (9th Cir. 1980) *Vasquez v. Metropolitan Dade County,* 968 F.2d 1101 (11th Cir. 1992). to suggest that the instant case is analogous to *Elliot v. Leavitt,* 99 F.3d 640 (4th Cir. 1996) (plaintiff in custody in a police car points a gun at two officers) and *Forrest v. Richardson* 112 F.3d 416 (9th Cir. 1997) (plaintiff who had committed a violent residential burglary and in possession of several firearms and 250 rounds of ammunition is shot while fleeing the scene) is insulting to the intelligence of this court. "Despite there being no evidence presented that the number of shots was unreasonable, Plaintiff argued that the jury should award one million dollars per bullet because Loughnan and Beucler were using her for target practice." (Appellants' brief, p. 16). Contrary to that argument, the issue in the instant case is not the number of bullets, but the reasonableness of shooting at all. "Is there any evidence here that these officers assessed anything? They just started using her for target practice. She wasn't a human being to them. Target practice, that's what they used her for." (R-22-26). BETTY WILLINGHAM at the time of the shooting was a threat to no one.

The Appellants alleged that they are entitled to qualified immunity, as the facts in the instant case are analogous to *Hegarty v. Somerset County,* 53 F.3d 1367 (1st Cir. 1995), *cert. denied,* 1165 S.Ct. 675 (1995), *Roy v. Inhabitants of City of Lewiston,* 42 F.3d 691 (1st Cir. 1994), *St. Hilaire v. City of Laconia,* 71 F.3d 20 (1st Cir.

1995), *Montoute v. Carr,* 114 F.3d 181 (11th Cir. 1997) and *Nelson v. County of Wright,* 162 F.3d 986 (8th Cir. 1998) (Appellants' brief, p. 18-9) They are wrong. *Hegarty, supra,* involved a shooting where the court determined that exigent circumstances existed to enter the home of the plaintiff, who in addition to having a number of firearms was known by the officers for her violent, irrational behavior, with a history of emotional instability and demonstrated antagonism toward law enforcement officers. *Id.* at p. 1378-9. In *Roy, supra,* the plaintiff admitted lunging with knives in his hand at the time of the shooting. According to the plaintiff, his civil rights were violated since they should have subdued him by a non-lethal method. Id. at p. 693. *St. Hilaire, supra,* involved the execution of an arrest warrant of a drug dealer known to be armed and dangerous and at the time of the shooting was going for his gun. *Id.* at p. 22-3. In *Nelson, supra,* the plaintiff did not dispute that at the time of the shooting he was involved in a physical struggle during which he had reached for the officer's gun, he repeatedly hit and kicked the officer and pushed him onto the floor of the closet. *Id.,* p. 988-9. Finally, in *Montoute, supra,* the officer had heard the discharge of a shotgun, then observed the plaintiff walking or running towards him with a 12-gauge, pistol-grip, sawed-off, pump shotgun in his right hand, pointing towards the ground. The plaintiff ignored repeated orders to drop the shotgun, fled past the officer and continued to flee even after the officer fired his first shot. *Id.,* p. 183. None of the facts in the cases relied upon by the Appellants remotely resemble the evidence presented in the Appellee's case. The Appellee was not a known dangerous felon, she was not involved in a physical struggle with anyone at the time of the shooting and she had no weapon in her hand at the time of the shooting.

Betty Willingham was a model citizen with no prior history of violence or criminal activity whatsoever. The Appellee does not dispute that the incident occurred within minutes of the initial stop of her brother. However, whether the time was 95 seconds, ten seconds or one second, the only issue is what the Appellee was doing at the time she was shot. According to their own witness, Stanley Cale, Appellants BEUCLER and LOUGHNAN were specifically trained to make split second decisions. The evidence presented by the Appellee, both testimonial and physical, clearly show that at the titne [sic] of the shooting BETTY WILLINGHAM was unarmed and posed a threat to no one. Appellants failed to assess the situation, they failed to act as reasonable officers, and therefore, their conduct was in violation of clearly established law.

* * *